

*** NOT FOR PUBLICATION ***

NO. 22679

IN THE SUPREME COURT OF THE STATE OF HAWAII

ROSE O'NEAL, Plaintiff-Appellant

vs.

DR. HENRY HAMMER, Individually and in his capacity
as a professional corporation, DR. HENRY HAMMER, INC.;
and DR. LEWIS WILLIAMSON, Individually and as a professional
corporation, LEWIS WILLIAMSON, INC., Defendants-Appellees

and

DR. RAY BERRINGER, Individually and in his capacity
as a professional corporation, DR. RAY BERRINGER, INC.;;
JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10;
DOE CORPORATIONS 1-10; ROE "NON-PROFIT" CORPORATIONS 1-10;
and ROE GOVERNMENTAL ENTITIES 1-10, Defendants

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 90-2577)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, and Nakayama, JJ.,
Acoba, J., dissenting, with whom Circuit Judge August,
assigned by reason of vacancy, joins)

Plaintiff-appellant Rose O'Neal appeals from the June 18, 1999 judgment of the circuit court of the first circuit, the Honorable B. Eden Weil presiding, finding in favor of defendants-appellees Henry Hammer, D.D.S. (Dr. Hammer) and Lewis Williamson, D.D.S. (Dr. Williamson). On appeal, O'Neal contends that the circuit court abused its discretion by: (1) denying her January 8, 1999 motion to continue; (2) denying her March 17, 1999 motion for reconsideration; (3) precluding evidence of future medical, dental, and related expense; (4) granting Dr. Hammer's motion for Rule 37 discovery; (5) denying her April 5, 1999 motion to continue; and (6) dismissing her claims with prejudice for failing to attend the April 5, 1999 pretrial conference. O'Neal

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further argues that the clerk of the court erred by awarding Dr. Hammer and Dr. Williamson all costs and that the circuit court erred by denying her motions to object to costs and to review costs.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we hold that: (1) the circuit court did not abuse its discretion by, sua sponte, dismissing O'Neal's claims with prejudice because the record clearly indicates notice, a hearing, and delay, see Compass Dev., Inc. v. Blevins, 10 Haw. App. 388, 876 P.2d 1335 (1994); Richardson v. Lane, 6 Haw. App. 614, 736 P.2d 63 (1987), cert. denied, 484 U.S. 953, reh'g denied, 484 U.S. 1037 (1987); (2) because O'Neal failed to prosecute her case, alleged court errors prior to the circuit court's dismissal of O'Neal's case are moot, see Richardson, 6 Haw. App. at 620, 736 P.2d at 68; (3) the court clerk did not abuse its discretion by taxing costs for expert witness travel expenses and deposition transcripts because these expenses are provided for by statute and O'Neal failed to challenge Dr. Hammer's costs and failed to show unreasonableness of Dr. Williamson's costs, see HRS §§ 607-9 and 607-12 (1993); Wong v. Takeuchi, 88 Hawai'i 46, 961 P.2d 611 (1988); Nani Koolau Co. v. K&M Construction, Inc., 5 Haw. App. 137, 681 P.2d 580 (1984); (4) considering the equities of the situation is discretionary, and even if the circuit court did not consider the equities of the situation, inasmuch the record indicates delay on O'Neal's part, O'Neal's argument is without merit, see HRS § 607-9; and (5) this court need not address the issue of whether the circuit court had jurisdiction over this case when it denied O'Neal's May 26, 1999 motion to object to costs because O'Neal failed to comply with the Hawai'i Rules of Appellate Procedure

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(HRAP) Rule 28(b)(4). However, the court abused its discretion by taxing Dr. Hammer's and Dr. Williamson's costs for expert witness fees against O'Neal because there is no statute allowing for such, Mist v. Westin Hotels, Inc., 69 Haw. 192, 738 P.2d 85 (1987). Therefore,

IT IS HEREBY ORDERED that the judgment from which the appeal is taken is vacated and remanded for determination of costs excluding expert witness fees.

DATED: Honolulu, Hawai'i, December 29, 2003.

On the briefs:

Jack Schwiegert,
for the plaintiff-appellant
Rose O'Neal

Douglas T.Y. Lee and Steven H.
Lee of Lee, Kim, Wong, Yee &
Lau, for the defendant-
appellee Dr. Henry Hammer

William A. Bordner and
Mary L. Lucasse of Burke,
Sakai, McPheeters, Bordner,
Iwanaga and Estes, for the
defendant-appellee
Dr. Lewis Williamson